INDICTMENT / IMPEACHMENT
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**MEMORANDUM**

TO: OIC Attorneys

FROM: Brett Kavanaugh

RE: Indictment/Impeachment

DATE: December 3, 1996

John asked me simply to circulate relevant materials on the question whether a sitting President may be indicted, a question that is obviously intertwined with the research Stephen and Craig have been doing on Section 595(c). I attach the following illustrative materials:

(1) The relevant portion of the brief of President Nixon in the Supreme Court in United States v. Nixon. (The Special Prosecutor did not address the issue squarely in his brief.)

(2) The relevant portion of the reply brief of President Nixon in the Supreme Court in United States v. Nixon.

(3) The brief submitted by Solicitor General Bork in the District Court of Maryland, arguing that a sitting Vice President could be indicted but a sitting President could not.

(4) The relevant portion of the brief of Solicitor General Dellinger in Clinton v. Jones, to be argued in the Supreme Court in January.

(5) The relevant portion of Professor Tribe's treatise.

(6) An article by Byron York in the American Spectator that summarizes the impeachment/indictment issues.

Nos. 73-1766 and 73-1834

# In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER
*v.*
RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER
*v.*
UNITED STATES OF AMERICA, RESPONDENT

*ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

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> President might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong and to be fully shown to the court before its production could be *insisted* on. 25 F. Cas. at 190–192. (emphasis in original) (487 F. 2d at 710).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interest, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds,* 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica,* this Court stated:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. (345 U.S. at 11).

At another point in *Reynolds* this Court stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. *Id.*

This point is further illustrated by *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 788, 792 (D.C. Cir. 1971). There the court held:



> Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . .

Certainly, this well-documented principle supports the proposition that, before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon,* Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974). Since that showing has not been made in this case, it was incumbent upon the district court to grant the President's motion to quash.

It is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence already known. Therefore under well-established case law, the subpoena should have been quashed in all respects by the court below.

## VI. AN INCUMBENT PRESIDENT CANNOT LAWFULLY BE CHARGED WITH A CRIME BY A GRAND JURY

### A. THE PRESIDENT CANNOT BE INDICTED WHILE HE IS SERVING AS PRESIDENT

It has never been seriously disputed by legal scholars, jurists, or constitutional authorities that a President may not be indicted while he is an incumbent. The reasons for the President's non-indictability bear

directly on the question of whether he may be named as an unindicted co-conspirator by a grand jury. The reasons are obvious and compelling. They are particularly relevant in light of the ongoing proceedings in the House of Representatives.

The Presidency is the only branch of government that is vested exclusively in one person by the Constitution. Art. II, section 1, clause 1 states:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years
> * * *

Article II then details the powers and functions that the President shall personally have and perform. The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers.

The President, personally, as no other individual, is necessary to the proper maintenance of orderly government. Thus, in order to control the dangerous possibility of any incapacity affecting the President, and hence the executive branch, the Constitution specifically limits and provides for all those events that could incapacitate a President.[65]

The necessary reason for the great concern and specificity of the Constitution in providing for a President at all times capable of fulfilling his duties,

[65] U.S. Const., Amend. 25, ratified on February 23, 1967. See Congressional Research Service, United States Congress, *The Constitution of the United States* at 42–43.



is the fact that all three branches of government must have the capacity to function if the system is to work. While the capacity to function is assured to the legislative and judicial branches by the numbers of individuals who comprise them, the executive branch must depend on the personal capacity of a single individual, the President. Since the executive's responsibilities include the day-to-day administration of the government, including all emergency functions, his capacity to function at any hour is highly critical. Needless to say, if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system.

Further analysis makes it even more clear that a President may not be indicted while in office. The President is vested under Art. II, section 3, clause 1, with the power "that the Laws be faithfully executed" and he has under Art. II, section 2, clause 1, the power of granting "Pardons for Offenses against the United States, except in Cases of Impeachment." Under that same clause, he shall appoint the "Judges of the Supreme Court" with "the Advice and Consent of the Senate." The President has also been granted by Congress the same power to appoint all Article III judges. 28 U.S.C. 44 and 28 U.S.C. 133. Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution. This is consistent with the concept of prosecutorial discre-

tion, the integrity of the criminal justice system or a rational administrative order. This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. Art. I, section 3, clause 7. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding office as President. This section reads: "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." While out of necessity an incumbent President must not be subject to indictment in order for our consitutional system to operate, he is not removed from the sanction of the law. He can be indicted after he leaves office at the end of his term or after being "convicted" by the Senate in an impeachment proceeding.

The history surrounding the Constitution's adoption further makes it clear that impeachment is the exclusive remedy for presidential criminal misconduct. A very revealing interchange took place on September 15, 1787, only two days before the final adoption of the Constitution. Gouverneur Randolph moved to except cases of treason from the power of the President to pardon offenses against the United States, a power granted by Art. II, section 2, clause 7.

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be



> liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

There are several relevant considerations that should be noted about the Convention and the provision that resulted from them. First, it is clear that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions.

The text of Art. I, section 3, clause 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. James Wilson noted that if the President himself be a "party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, 1787, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment. 2 *Farrand* 500.

The decision to make the Senate, and not the Supreme Court,[66] the ultimate body to decide upon the Presi-

[66] In this respect Gouverneur Morris noted:

> [N]o other tribunal than the Senate could be trusted [to try the President]. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate

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dent's removal, further argues for limiting any court or grand jury from removing a President by way of indictment or other judicial process.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton when he wrote:

> The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. *The Federalist,* No. 65, at 426 (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist,* and uses it there to illustrate an important distinction between a President and a king.

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.

would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. *2 Farrand 551.*



So far as we are aware, that an incumbent President is not indictable is a proposition that has never been challenged by the Special Prosecutor. The proposition is relevant here because of the suggestion that an otherwise valid claim of privilege by the President should be overridden if there is in some manner an alleged showing of a *prima facie* criminal case or a *prima facie* finding of criminal involvement, such as the authorizing of the naming, or the naming of the President as an unindicted co-conspirator. If, however, such facts were true, which they are not, they go not to the evidentiary needs of the grand jury, but to those of the Committee on the Judiciary in the House.

Whatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them. The grand jury may not indict the President or allege that there is probable cause to find criminal liability on the part of a President. Thus, such a claimed "finding" by the grand jury has no force in overcoming any presidential claim of privilege, as it is a legal nullity, being constitutionally impermissible.

A second important theme that runs through the debates of the Constitutional Convention of 1787 is whether the President should be answerable, in an impeachment proceeding, to the courts or to the Senate. On June 13, 1787, the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdic-

tion of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of impeachment." 2 *Farrand* 186. As noted above a subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493. This was approved on September 8th by a vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect, thus further reinforcing the conclusion that it would be wholly inconsistent with the Framer's intent to hold a President indictable.

Finally, it should also be observed that there was no sentiment in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President would not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection. This point was extensively debated on July 20,



1787, with the motion to strike out the impeachment provision offered by Charles Pinckney and Gouverneur Morris, 2 *Farrand* 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and in fact during the course of the debate on it, Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the only means by which they considered that the President was subject to law. Thus, Colonel George Mason said:

> No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. (2 *Farrand* 65).

And again Eldridge Gerry—

> urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the Chief Magistrate could do no wrong. (2 *Farrand* 66).

By a vote of eight states to two, the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachment. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On September 14th, the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

This examination of the proceedings of the Constitutional Convention of 1787 establishes that the Framers deliberately chose one particular means of guarding against the abuse of the powers they entrusted to a President. He may not be indicted unless and until he has been impeached and convicted by the Senate. Impeachment is the device that ensures that he is not above justice during the term in office, and the trial of impeachment is left to the Senate and not to the courts.

Those principles have been recognized by this Court. In the early and leading case of *Marbury* v. *Madison* 1 Cranch (5 U.S.) 137, 165 (1803), the Court said:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

Thirty-five years later, in *Kendall* v. *United States ex. rel. Stokes,* 12 Pet. (37 U.S.) 524, 610 (1838) the Court said:

> The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.[cr]

[cr] See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

> The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil.



We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them. . . ." *Home Building & Loan Assn.* v. *Blaisdell.* 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it.

*Powell* v. *McCormick,* 395 U.S. 486 (1969), reaffirms the extraordinary nature and strictly limited character of the power to remove political officials, particularly those directly elected by the people. That decision held that the Congress could not expand the constitutional limits mandated for expelling or alternatively excluding a Congressman from his seat. U.S. Const., Article I, section 5, clause 2; Article I, section 2, clause 2. The constitutional sanctity of the people's electoral choice, therefore, was considered so important that it required judicial intervention and protection. While judicial action was required in *Powell* to protect the electorate's rights under the Constitution, the reverse is certainly not true. This same power cannot be used to nullify the electorate's decision. This is particularly true in the case of the Presidency when the Constitution explicitly delegates the power to remove the President under strict conditions to the representatives of the voters who elected him. It seems improbable, at best, to suggest that the Framers

felt that any court and grand jury could also remove or even legally incapacitate the Chief Executive. The specificity and grave nature of the impeachment process and the total absence of any discussion of any other method, is an extremely powerful argument for the exclusivity of impeachment as the only method of removing a President.

The *Powell* case emphasizes that while another branch cannot control the Congress in the execution of their peculiar constitutional responsibilities, neither can the Congress, as a whole, control the execution of a particular Congressman's duties via exclusion. Exclusion is an action that the Congress may take solely within the limits of Article I, section 2, clause 2. It is not a political tool. Obviously this also applies to the executive branch. If Congressman Powell could not be excluded from his congressional seat by a majority of Congress except by adhering to the requirements of the Constitution, then surely the Chief Executive may not be deprived of his ability to control decisions in the executive branch by a member of the executive department, unless the President has specifically delegated this authority to him. Nor can such an employee control the President through judicial or criminal process.

The decision in *Powell* is also harmonious with the long established principle that the Judiciary may prevent other branches from overstepping their constitutional bounds of responsibility. *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803). In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), this Court



made a similar determination that certain actions taken by the executive branch were beyond the scope of the constitutional duties mandated to the branch. If the Judiciary had determined that seizing the steel mills had been within the powers the Constitution and the laws had entrusted to the President, clearly it could not have forced the President to exercise his discretion and seize the mills. Although the Supreme Court has ruled innumerable laws unconstitutional over the last 187 years it has never once mandated that either Congress exercise its descretion to pass a law or the Executive prosecute an individual. The reasons are self-evident.

Today, in our nuclear age, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution. The whole Watergate problem has illustrated how truly complex the right decision can be. It is thus all the more necessary that a President have the ability to freely discuss issues, think out loud, play the devil's advocate, and consider alternatives, free from the threat that a probing statement will one day form the basis for an allegation of criminal liability.

B. THE GRAND JURY ACTION OF NAMING THE PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IS A NULLITY

The constitutional policy that mandates that the President is not subject to judicial process or criminal indictment while President, clearly shows that the grand jury action naming or authorizing the name of

the President as an unindicted co-conspirator contravenes the constitutional power of the grand jury or any court of this country.

The implication by a grand jury on the basis of certain alleged facts, that the President may have violated the law can have only one proper result. As stated above, the grand jury may with the district court's consent, forward the factual material creating the implications, minus any conclusions, to the House of Representatives.[68] That result was fulfilled when the grand jury filed with the court below its factual report and recommended that it be forwarded to the House Judiciary Committee, in March of 1974. The President made no objection to this move because the House of Representatives is the proper body, the only proper body, to impeach a President, as part of the process of removing a President from office. The grand jury's constitutionally impermissible authorization to the Special Prosecutor, permitting the President to be named or naming the President as an unindicted co-conspirator, however, attempts to subvert and prejudice the legitimate constitutional procedure of impeachment.

[68] This is the necessary implication of the grand jury's role, as a body with a limited mandate, as opposed to the House of Representatives whose political and constitutional mandate entitles them to consider whether in light of the President's complex responsibilities and political concerns a particular action or statement of his constitutes a crime. While any citizen may clearly express an opinion to his Congressman on the President's guilt, innocence or character, a grand jury, as an official part of our system of justice, with all that implies for its credibility and impact, may not.



In its opinion in *In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974), the district court convincingly demonstrated why the June 5, 1972, Grand Jury could not authorize the naming of the President as an unindicted co-conspirator. The very reasons why it was proper to refer the *Report and Recommendation to the House of Representatives* are those that argue against referring the naming or the authorization to name the President as an unindicted co-conspirator to that same body. In fact, these same considerations today require its expungement, because it is a legal nullity that continues to prejudice the President by its purported legal significance and apparent authority. The court below noted of the Report:

> The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical*. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. *It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government.* Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and

no more. (370 F. Supp at 1226) (emphasis added).

As noted by the district court nothing could be more important to America's future than that the ongoing impeachment be "unswervingly fair." 370 F. Supp at 1230. And nothing could be more clear than that the naming of the President of the United States as an unindicted co-conspirator by a secret grand jury proceeding, which was subsequently leaked to the press, is a direct and damaging assault on the fairness of the House impeachment proceeding. It is the kind of prejudice that a court would certainly be required to remedy or compensate for if it affected the rights of a criminal defendant to a trial, free from the probability of prejudicial pre-trial publicity. *In Re Murchison*, 349 U.S. 133 (1955); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

This unauthorized action of the grand jury that has the appearance of official status, and presently the implicit approval of the lower court may well directly affect the outcome of the House procedure. Yet, the President has no legal recourse against the grand jury's action except with this Court. No petit jury, whose obligation is to find guilt "beyond a reasonable doubt" is empowered to adjudicate this charge against the President.[69]

The rigorous adversary format, with that most powerful tool for determining the truth, cross-examination, is not available in the secret grand jury

[69] While the President, as an individual, might some day vindicate himself before a petit jury, as long as he holds the office of President he could not be vindicated in a court of law.



setting. It is now well established that the right of cross-examination is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected.[70] The fundamental right to present evidence and to cross-examine witnesses in an impeachment proceeding is manifest. As the experience of our judicial system has demonstrated, the most effective method of establishing the truth of an accusation is to permit the respondent the right to personally cross-examine those presenting adverse testimony. The Supreme Court flatly states in *Greene* v. *McElroy*, 360 U.S. 474 (1959) that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-

[70] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Bell* v. *Benson*, 402 U.S. 535 (1971); Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972) and *Wisconsin* v. *Constaintineau*, 400 U.S. 433, 437 (1971).

> examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . action was under scrutiny. (360 U.S. at 496–497).

Justice Douglas in the concurring opinion in *Peters* v. *Hobby*, 349 U.S. 331 (1955), emphasized the necessity of permitting a respondent to cross-examine all adverse witnesses.

> Under cross-examination [witnesses] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and outer darkness, without the rudiments of a fair trial. (349 U.S. at 351).

There is no way within our judicial system to disprove allegations made against a President. It is because of this and because of the vast impact of this purportedly official criminal implication and charge against a President, on the whole body politic, that the Constitution requires no less a body than the whole House of Representatives to find the President likely enough



to be guilty of criminal misconduct that he should be tried by the Senate.

The characterization of the President of the United States as an unindicted co-conspirator, is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice; the grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the Special Prosecutor to use such a constitutionally impermissible device, as an incident to an evidentiary desire, for the purpose of overcoming executive privilege, is wholly intolerable. The American legal system has never allowed the desire for evidence to go beyond the bounds of law. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The President should not be made a hostage of the unwarranted pressure inherent in the grand jury's improper action.

The former Special Prosecutor, Mr. Archibald Cox, was quoted in the *New York Times* on January 5, 1974, as dealing with this exact issue. In response to rumors that he would name the President as an unindicted co-conspirator the newspaper printed this:

> Mr. Cox, in the telephone interview from his vacation home in Maine, described such a technique as 'just a backhanded way of sticking the knife in.' *New York Times*, January 6, 1974, p. 1, col. 6; p. 40, col. 1.

A later issue of the *New York Times* dealt with the same basic questions when it stated:

> Leon Jaworski, the Watergate special prosecutor, advised the Federal Grand Jury investigating the Watergate break-in and cover-up that it would not be 'responsible conduct' to move to indict President Nixon, according to a spokesman for the office.
>
> Although Mr. Jaworski's advice to the Grand Jury did not refer to President Nixon by name—the matter was discussed in terms of a factual situation such as exists—it did include the suggestion that the House Judiciary Committee's impeachment inquiry was the proper forum to consider matters of evidence relating to a President.
>
> Although there had been speculation that Mr. Jaworski had tentatively concluded that legal complications militated against a move to indict the President, today's statement was the first direct confirmation of the fact. *New York Times*, March 12, 1974, p. 1.

It is only by impeachment and conviction and then subsequent criminal action that the President may be found to be a member of any criminal conspiracy. To base a desire for evidence on a stratagem which attempts to cripple the Presidency, and thus nullify the President's claim of executive privilege, is unprecedented, but more significantly a grotesque attempt to abuse the process of the judicial branch of government. Under our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President. And, that trial must take place in the Senate with the Chief Justice presiding.



C. EVEN IF IT WERE PERMISSIBLE, THE NAMING OF AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR DOES NOT CONSTITUTE A PRIMA FACIE SHOWING OF CRIMINAL ACTIVITY

In the preceding section we have conclusively demonstrated why it is not constitutionally permissible to name an incumbent President as an unindicted co-conspirator. However, if such an act had been constitutionally permissible, it would nevertheless not have the effect of constituting a *prima facie* showing of criminality sufficient to overcome the President's constitutional claim of executive privilege.

There is a basic distinction between a finding of "probable cause" and the showing of a "*prima facie*" case which makes the Special Prosecutor's use of these two terms in the instant case both inaccurate and improper.

Probable cause is a legal concept based on the proposition that a crime "might" have been committed. As such it justifies an inquiry into an individual's guilt. It does not justify any legal effect that would operate to overcome either a presumption of innocence or executive privilege attaching to an otherwise valid claim. On the other hand, *prima facie* evidence is evidence sufficient to have a legal effect, which if unrebutted, is sufficient to go to a jury in a trial setting and sufficient to convict an individual of a crime before a petit jury. The finding of the grand jury at issue here has none of this sufficiency. It has never been tested in

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Nos. 73-1766 and 73-1834

JUL 1 1974

MICHAEL RODAK, JR., C

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

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RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

---

*ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

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345 U.S. at 11. Similarly, the court of appeals in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, No. 74–1258 (D.C. Cir., May 23, 1974), regarded an identical waiver argument, offered by the plaintiffs in that case, as so lacking in substance that it did not merit discussion in the opinion.

Finally, there is much weight in a point made by Judge MacKinnon in his dissent in *Nixon* v. *Sirica*, 487 F. 2d 700, 758–759 (D.C. Cir. 1973). He wrote:

> There has been no waiver. This conclusion rests upon three factors: the strict standards applied to privileges of this nature to determine waiver; the distinction between oral testimony and tape recordings; and, most important, considerations of public policy that argue persuasively for a privilege that permits the Chief Executive to disclose information on topics of national concern without that which properly ought to be withheld in the public interest.

Like Judge MacKinnon, we think that the most important of these points is the one last stated. Plainly the country is best served when there is the maximum disclosure possible from the Executive, consistent with the requirements of the public interest. This President, like his predecessors, has always acted on that principle. Disclosure has been the rule and claim of privilege the rare exception. But if this Court were to accept the Special Prosecutor's beguiling suggestion that this case can be decided on a narrow ground of waiver, the inevitable long-term consequence must be less disclosure, not more, since Presidents will be reluctant to make public even those things that can be



released without harm to the public interest, if by doing so they may be held to have waived their constitutional privilege to withhold related information that the nation's interests require be kept confidential.

## IV. THE SPECIAL NATURE OF THE PRESIDENCY

The Special Prosecutor states an obvious and important truth when he reminds us that "in our system *even the President* is under the law." (S.P. Br. 68) (emphasis in original). A fundamental error that permeates his brief, however, is his failure to recognize the extraordinary nature of the Presidency in our system and that the Framers, who fully understood this, provided an extraordinary mechanism for making a President subject to the law.

The President is not merely an individual, to be treated in the same way as any other person who has information that may be relevant in a criminal prosecution. He is not, as the Special Prosecutor erroneously suggests, merely "the *head* of the Executive Branch." (S.P. Br. 79) (emphasis in original). Instead, as we pointed out at the beginning of this brief, it was announced by this Court more than a century ago, and since reiterated, that "the President is the Executive Department." *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475, 500 (1867). So much is apparent from the Constitution itself. Article II begins with the simple but sweeping declaration: "The executive Power shall be vested in *a* President of the United Statese of America" (emphasis added). In addition, the President, as this Court has recognized, is, more than any other officer of government the represent-

ative of all of the people. *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Chief Justice Taft went on to say that

> as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

It was no mere happenstance that all executive power was vested in a single person, the President. This was a subject of recurring debate at the Constitutional Convention. Suggestions of a multi-member Executive were repeatedly pressed and as repeatedly rejected. It was seen, as Dr. Franklin said, as "a point of great importance." 1 *Farrand* 65.

In this respect the Executive differs from the other two great branches of government. The legislative power is vested by Article I in "a Congress of the United States," divided into two bodies and composed now of 535 members. The judicial power is, by Article III, spread among the nine Justices of this Court and the hundreds of judges of the inferior courts that Congress has seen fit to ordain and establish. But one person, and one person alone, is entrusted by Article II with the awesome task of exercising the executive power of the United States. "The President is the Executive Department." This difference, as we shall develop below, has important consequences. It serves to distinguish many of the cases relied on by the Special Prosecutor, involving as they do individual



members of the legislative and judicial branches. Specifically, the particular position the President occupies in our constitutional scheme means that the courts cannot issue compulsory process to compel him to exercise powers entrusted to him in a certain way, that, so long as he is President, he is not subject to criminal process, and that, as a logical corollary, he may not, while President, be named as an unindicted co-conspirator.

Of course, as we have already pointed out (Pres. Br. 52 n. 45), the Framers did not want a king, and Hamilton devoted all of the 69th *Federalist* to demonstrating that the Presidency, as created in the Constitution, bore no resemblance to the monarchy from which the colonists had successfully rebelled. The term of the President is limited to four years. The legislative branch controls the national purse strings, the war power, and the general policy direction of government. The President is given only a limited veto, subject to being overridden, over legislative acts. He is given no role whatever in the process of constitutional amendment. Finally, and most important for present purposes, the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of his term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

We have already developed in detail the process by which the impeachment provisions of the Constitution took form. (Pres. Br. 95–104). The language of Article I, section 3, clause 4, can hardly be read in any other

way than that indictment of a President can only follow his conviction on impeachment. This was certainly the understanding of the delegates at Philadelphia, of the contemporary expositors of the Constitution, and of students of constitutional law from 1787 until today.

There is nothing in *United States* v. *Isaacs*, 493 F. 2d 1124 (7th Cir. 1974), *cert. denied* —— U.S. ——, (June 17, 1974), that is contrary to what we have just said. A judge of a court of appeals is not the judicial branch. He is a part of that branch, but the Judiciary can function uninterrupted during those rare occasions when a single judge is forced to stand trial on a criminal charge. The Presidency cannot function if the President is preoccupied with the defense of a criminal case, and the thought of a President exercising his great powers from a jail cell boggles the mind.[26]

The President, as we have noted, *is* the Executive Department. If he could be enjoined, restrained, indicted, arrested, or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the co-equality of the Executive.

The conclusion that the President is not subject to indictment while in office is consistent also with a proper ordering of government. When this principal national leader, elected by all of the people, is to be

[26] It is also worthwhile noting that at the Convention the discussion of impeachment was wholly in terms of a remedy against the President. Berger, *Impeachment: The Constitutional Problems* 100 (1973). The inclusion in Article II, section 4, of the "Vice President, and all Civil Officers of the United States" was made without discussion in the closing hours of the Convention. 2 *Farrand* 575.



removed, it is proper that the removal be considered and accomplished only by a body that, like the President, is politically representative of the whole Nation. Impeachment is a process designed to deal with the problem of criminal conduct by the President and yet still preserve the majoritarian character of the Republic. Criminal indictments or judicial orders cannot provide the tools to remove or limit a whole branch of government, and were not contemplated by the Founders for such a purpose. Only the branch of government that represents the people who elected the President, the legislative branch, can take actions that will in any way remove or tend to remove a President from office. This is the function of Congress, not of a grand jury.

For reasons that we have already fully developed (Pres. Br. 107–115), it follows *a fortiori* from the non-indictability of an incumbent President that he cannot be named as an unindicted co-conspirator, and that the action of the grand jury in this case must be ordered expunged. The ability of a President to function is severely crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party to a criminal conspiracy and make this in a form that does not allow that finding to be reviewed or contested and disproved.[27] To allow this would be a mockery of due process and would deny to Presidents of the United States even those minimal protections that the Constitution extends to

[27] And to suggest that the naming of a President as a criminal co-conspirator, even if unindicted, is not an "impeachment" of the President is, we submit, to play games with common words and common sense.

prison inmates subject to disciplinary proceedings. *Wolff* v. *McDonnell*, —— U.S. ——, No. 73-679 (June 26, 1974).

If the grand jury had before it evidence, competent or otherwise, *United States* v. *Calandra*, 414 U.S. 338 (1974), that led it to think that the President had been party to a crime, its only permissible course of action was to transmit that evidence to the House Judiciary Committee, rather than to make a gratuitous, defamatory, and legally impermissible accusation against the President.

Presumably the Special Prosecutor advised the grand jury to make this finding, and did so with the thought that it would strengthen his hand in litigation such as the present case (P.S.A. 8). If the President could be considered a co-conspirator, then all of his statements would arguably come within the exception to the hearsay rule and would meet the requirement of Rule 17(c) that subpoenaed material must be evidentiary in nature. In addition, this impermissible finding is relied on by the Special Prosecutor for his argument (S.P. Br. 90–102) that executive privilege vanishes if there is a *prima facie* showing of criminality. But even if the grand jury were empowered to make this finding—and as a matter of law it cannot—we have already shown that an allegation of criminal activity does not overcome the assertion of presidential privilege (Pres. Br. 82–86), and that a grand jury finding, based as it is only on a showing of probable cause, falls far short of the *prima facie* showing of



criminality that is required to defeat even the usual evidentiary privileges. (Pres. Br. 115–122.)[28]

The Special Prosecutor makes the surprising suggestion that the President enjoys no privileges or immunities.

> One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. (S.P. Br. 77).

But it is quite clear that the privileges given to individual members of the legislative branch by Article I,

[28] The cases relied on by the Special Prosecutor (S.P. Br. 98) are not to the contrary. Such cases as *Ex parte United States*, 287 U.S. 241, 250 (1932), *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950), and the others cited stand only for the proposition that a grand jury indictment conclusively establishes that there is probable cause to hold the person named for trial. They do not hold that the grand jury's action is an evidentiary showing of a *prima facie* case.

Again the Special Prosecutor is not helped by *United States* v. *Aldridge*, 484 F. 2d 655, 658 (7th Cir. 1973); *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), *cert. denied*, 308 U.S. 589 (1940); or the other cases he cites with regard to attorney-client privilege. In those cases the privilege was held to vanish only after the government by proof at trial, had made a *prima facie* showing of criminal involvement.

Finally, the Special Prosecutor's heavy reliance on *Clark* v. *United States*, 289 U.S. 1 (1933) (S.P. Br. 95–97, 100–101, 108–109), is misplaced. Quite aside from the very different nature of the "privilege," or, more properly, rule of competency, there in issue, Justice Cardozo was quick to point out that "[i]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud," 289 U.S. at 15, and that "there must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." 289 U.S. at 14.

section 6, were given them for a specific and well-understood purpose. This was to protect the legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary . . ." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966). It was "designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States,* 408 U.S. 606, 616 (1972).

The Executive needed no protection from himself. As chief of state, chief executive, commander-in-chief, and chief prosecutor, he had no need to fear intimidation by a hostile executive or prosecution by an unfriendly executive. In addition, he was protected further by the elaborate procedure for impeachment, and by his immunity from criminal process until he had been convicted on impeachment. Thus the Constitution says nothing about immunities of the Executive comparable to what it says about members of the legislative branch because to have done so would have been to guard against an evil that could never come to pass.

Even members of the executive branch do have to fear damage actions brought by private citizens, and this Court has not been slow to read into the Constitution an implied immunity to protect the Executive in this situation. The leading case is *Spalding* v. *Vilas,* 161 U.S. 583 (1896), frequently relied on in this Court and always with approval. E.g., *Barr* v. *Matteo,* 360



U.S. 564, 570 (1959);[29] *Scheuer* v. *Rhodes,* 413 U.S. 919, 927 n. 8 (1974).

The Special Prosecutor would have the Court believe that the discretion about production of documents, which it has always been recognized that Presidents have, shrinks to a mere ministerial duty to produce what is demanded whenever a court disagrees with the Chief Executive's assessment of what the public interest requires. The argument seems little more than a play on words, intended to avoid the decisions, from *Marbury* on, that the courts may compel ministerial

[29] In the *Barr* case this Court relied heavily, in discussing immunity for executive officers, on the well-known opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579 (2d Cir. 1949), where judicial immunity was at issue. Several of Judge Hand's insights in that case are applicable here. Thus he says:

> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . . (177 F. 2d at 581).

Again Judge Hand observed that "[t]here must indeed be means of punishing public officers who have been truant to their duties . . ." 177 F. 2d at 581. But the Constitution provides three sanctions against a truant President. He is subject to the political sanction of being defeated for reelection and to the legal sanctions of conviction on impeachment and of criminal punishment after he has been removed from office.

acts but that they cannot interfere with discretionary decisions of high executive officers.

Nothing could be clearer than that the decision to disclose or to withhold the most intimate conversations of the President with his chief advisers involves the gravest and most far-reaching possible considerations of public policy. Who can say what the long term, or even short term, public effects of the President's decision to make public transcripts of tapes of his conversations about Watergate will be? It was a difficult and monumental decision, and no man living can predict with assurance how ultimately the history of this country, and indeed of the world, may be influenced by it. It was a discretionary decision in the most important sense, and it is nonsense to call such a disclosure "ministerial" merely because the final action of disclosure can be accomplished by a messenger.

A presidential decision to release the confidential tapes or written memoranda of his meetings with his advisers involves the same basic discretion as his initial decision to make such records. Surely neither the courts nor Congress could require Presidents to make such recordings on the ground that they would then be available should there be charges of misconduct against aides to some future President.

This case must be viewed in the light that the President is the executive branch, co-equal to the multi-membered legislative and judicial branches. If that co-equality is to be preserved, the President cannot be subject to the vagaries of a grand jury nor deprived of his power to control disclosure of his most confi-



dential communications. If he misuses his great powers, he must be proceeded against by the remedy that the Constitution has provided.

### V. THE SPECIAL PROSECUTOR HAS NOT DEMONSTRATED A UNIQUE AND COMPELLING NEED FOR THIS MATERIAL

The Special Prosecutor makes the casual suggestion that "[t]here is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell*, et al., upon all relevant and material evidence." (S.P. Br. 107). Doubtless every prosecutor in history has thought the same thing. The genius of the law, happily, has rejected that course, and in this case the Special Prosecutor's suggestion begs every important question before the Court. A prosecutor has the right to every man's evidence "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). If, as we have argued, the materials at issue are subject to a valid privilege, based both on the Constitution and on the common law, the Special Prosecutor may not have them, no matter how relevant or material he thinks they may be, any more than he could require the defendants in this case to produce relevant and material evidence based on what they told their attorneys or based on confidential communications with their wives.

Our argument, of course, has been that the great question is, as Judge Wilkey put it, "Who Decides?", and that the answer to that question is that the President decides. But even if we are wrong on that, and

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William Jefferson **CLINTON**, PETITIONER,
v.
Paula Corbin **JONES**.
No. 95-1853.
United States Supreme Court Amicus Brief.
October Term, 1995.
August 8, 1996.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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*I QUESTION PRESENTED

Whether a private civil action for damages against the President of the Unite States, based on events occurring before the President took office, should be permitted to go forward during the President's term of office.

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lawsuits," id. at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, id. at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," id. at 751, if he were compelled to defend himself against a private suit for damages during his term in office. That diversion would "raise unique risks to the effective functioning of government." Ibid. The teaching of Fitzgerald is that the judicial system should not lend itself to such risks. [FN8]

FN8. A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility that criminal prosecutions could be brought against a sitting President. See, e.g., 2 Max Farrand, Records of the Federal Convention of 1787, at 64-69, 500 (New Haven 1911); The Federalist No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law") (emphasis added). As the Court noted in Fitzgerald, "there is a lesser public interest in actions for civil damages than * * *in criminal prosecutions." 457 U.S. at 754 n.37. In In Re Proceedings of the Grand Jury Impaneled December 5, 1972, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

*16 C. The court of appeals read Fitzgerald to mark the outer limit of Presidential immunity. Pet. App. 8-9. In the court's view, "[t]he [Supreme] Court's struggle in Fitzgerald to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion * * * that beyond this outer perimeter there is still more immunity waiting to be discovered." Id. at 9. Because the instant case involves claims that are (with one possible exception, see note 3, supra) beyond "the 'outer perimeter' of [the President's] official responsibility," Fitzgerald, 457 U.S. at 756, the court of appeals concluded that Fitzgerald precluded the recognition of any constitutionally grounded immunity here. Pet. App. 9. And because the court of appeals believed that the President "is entitled to immunity, if at all, only because the Constitution ordains it," id. at 16, the court regarded Fitzgerald as dispositive of the question whether a sitting President may be compelled to defend against a private lawsuit during his service in office.

The court of appeals erred in asserting that deferral of litigation until the President leaves office would "extend[] presidential immunity beyond the outer perimeter delineated in Fitzgerald." Pet. App. 9. The plaintiff in Fitzgerald *17 did not name former President Nixon as a defendant until nearly four years after the conclusion of his Presidency. See 457 U.S. at 740. The case therefore did not implicate--and the Court accordingly did not discuss--the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit. Rather, the Court focused on the danger that the

be said of the Senate's power to try impeachments.[21] Indeed, assertions of executive privilege which thwart impeachment investigations or trials can themselves quite properly become the basis for an article of impeachment.

For example, prior to President Nixon's resignation in August 1974, the Judiciary Committee of the House of Representatives recommended to the full House an Article of Impeachment (Article III) charging that President Nixon's repeated refusal to comply with Judiciary Committee subpoenas issued in the course of the impeachment investigation was "subversive of constitutional government," since such refusal involved a presidential usurpation of "functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."

Although the House Judiciary Committee voted not to seek judicial enforcement of its subpoenas to the President but sought instead to submit the validity of those subpoenas to the House and Senate, it has been suggested in plausible dictum that, if and when judicial enforcement is properly requested, federal courts possess constitutional power to review the validity of congressional impeachment subpoenas answered by claims of executive privilege, and further that the congressional interest in judicially enforcing such subpoenas (if otherwise valid) is substantial enough to outweigh any danger that the prejudicial publicity associated with the impeachment investigation might frustrate the impaneling of unbiased juries in ancillary criminal trials.[22]

## § 4–17. The Ultimate Remedy: Impeachment for High Crimes and Misdemeanors

Although the impeachment process has been used periodically since 1789,[1] there has been no judicial attempt to define its limits. This is attributable, in part, to the constitutional language ostensibly confining the issue of impeachment to the legislative branch of government, and thus arguably barring judicial review of impeachments under the political question doctrine.[2] What follows, therefore, is not a discussion

jury matters should be lawfully available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation."); 40 Op.Atty. Gen. 45 (1941) (executive privilege would not be invoked in impeachment proceedings).

21. See § 4–17, infra.

22. See Senate Select Committee v. Nixon (II), 370 F.Supp. 521, 522–23 (D.D.C. 1974), aff'd, 998 F.2d 725 (D.C.Cir. 1974).

§ 4–17

1. For a survey of impeachments in the United States, see "Impeachment and the U.S. Congress," Cong.Q. (March 1974).

2. See Ritter v. United States, 84 Ct.Cl. 293 (1936), cert. denied 300 U.S. 668 (1937) (dismissing suit of a judge who contended that the Senate had tried him for non-impeachable offenses: "the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final"). See generally C. Black, Impeachment: A Handbook 53–55 (1974) (urging that it would be absurd to reinstate a President whose legitimacy had been stripped through impeachment by the House of Representatives and conviction by the Senate, legislative bodies presumably reflecting the sense of polity); Broderick, "A Citizen's Guide to Impeachment of a President: Problem Areas", 23 Catholic U.L.Rev. 205 (1973). See also H. Black, Constitutional Law 121–22 (1897); 1 J. Story, Commentaries § 805, at 587; 3 W. Willoughby, The Constitutional Law of the United States 1451 (2d ed. 1929). That impeachments are entirely beyond the pur-

of a judicially articulated law of impeachment, but is instead an independent analysis, buttressed as appropriate by conclusions that can be drawn from the attempt to impeach President Nixon,[3] as well as from earlier impeachment proceedings.[4]

Article II, § 4, provides that "[t]he President, Vice-President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Members of Congress are not "civil officers" for purposes of impeachment. But although Senators and Representatives thus cannot be impeached, they can be removed from office. Article I, § 5 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . . Each House may . . . punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.[5]

Although of course private citizens are not subject to impeachment, the resignation of a "civil officer" does not give immunity from impeachment for acts committed while in office.[6] Congress might wish to continue an impeachment proceeding after its target has resigned from office in order to deprive the resigned officer of any retirement benefits affected by the fact of impeachment or conviction; to solidify the lesson of the officer's misconduct in the form of clear precedent; or simply to make plain to the public and for the future that the resigned officer's withdrawal from office was the result not of unjust persecution but rather of the way in which the officer had abused an official position.

Under the provisions of article II, § 4, the President, Vice President, or any other civil officer may be impeached for, and convicted of, "Treason, Bribery, or other high Crimes and Misdemeanors." Of these impeachable offences, only treason is expressly defined by the Constitution. Article III, § 3 states that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." Despite then-Congressman Gerald Ford's well-known assertion that "an impeachable offence is whatever a majority of the House of Representatives considers [it] to be",[7] there is now wide agreement that the phrase "high Crimes and

view of the courts is not always conceded, however. See R. Berger, Impeachment 108 (1973); I. Bryant, Impeachment, Trials and Errors 182–97 (1972); Goldberg, "Question of Impeachment," 1 Hastings Con.L.Q. 5, 8 (1974); Rezneck, "Is Judicial Review of Impeachment Coming?", 60 A.B.A.J. 681 (1974); Cf. Powell v. McCormack, 395 U.S. 486 (1969), discussed in § 3–6, supra. Given the decision of the Constitutional Convention to transfer impeachment trials from the Supreme Court, where they were initially to have been conducted, to the Senate, the more defensible view appears to be the traditional one of non-reviewability.

3. The impeachment effort was terminated after the President's resignation on August 9, 1974.

4. Although impeachment has been used primarily as a way of removing federal judges, the special characteristics of judicial impeachments are not discussed here, but rather in Chapter 3, supra.

5. See Powell v. McCormack, 395 U.S. 486 (1969).

6. See Firmage and Mangrum, "Removal of the President: Resignation and the Procedural Law of Impeachment," 1974 Duke L.J. 1023, 1089–95.

7. 116 Cong.Rec. 11913 (1970). The falsity of that position is evident from an examination of the debates on impeachment at the Constitutional Convention. In response to a suggestion by Colonel Mason that impeachments not be limited to cases of bribery and treason, but include as well instances of "maladministration," Madison

Misdemeanors" was intended by the Framers to connote a relatively limited category closely analagous to the "great offences" impeachable in common law England.[8] In addition to treason and bribery, the "great offences" included misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption.[9]

There have been only two serious attempts to impeach American Presidents. In both instances, the offenses charged reflected the impact of the common law tradition discussed here: offenses have been regarded as impeachable if and only if they involve serious abuse of official power.

President Andrew Johnson was impeached by the House of Representatives in 1867 on the ground that he had attempted to dismiss Secretary of War Stanton in apparent defiance of the Tenure of Office Act of 1867.[10] Johnson escaped conviction in the Senate by one vote.

Representative John Bingham, leader of the House Managers of Impeachment, defined an impeachable offence in the traditional manner: "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose." [11]

History has not dealt kindly with the impeachment of Andrew Johnson. The procedural arbitrariness of the Johnson trial, and the fact that the law Johnson ignored was widely regarded as unconstitutional even before the Supreme Court so declared in *Myers v. United States*,[12] have together contributed to a fairly broad agreement that the congressional attempt to oust Johnson was itself an abuse of power.[13]

admonished that "so vague a term [would] be equivalent to tenure during the pleasure of the Senate." Mason then substituted the current constitutional language—"other high crimes and misdemeanors"—for "maladministration," apparently to ensure that mere congressional disapproval of the policies of a President could not serve as a basis for impeachment. See M. Farrand, The Records of the Constitutional Convention of 1787 (1911).

8. See, e.g., R. Berger, Impeachment 53–102 (1973); C. Black, Impeachment: A Handbook 39–40 (1974); Broderick, "A Citizen's Guide to Impeachment of a President: Problem Areas," 23 Catholic U.L. Rev. 205 (1973). Our law of impeachment has also been said to derive from the Roman law of infamy. See Franklin, "Romanist Infamy and the American Constitutional Concept of Impeachment," 23 Buff.L. Rev. 313 (1974). See generally "The Legal Aspects of Impeachment: An Overview," prepared by the Office of Legal Counsel of the Department of Justice (February 1974). For an unusual argument that the impeachment clause makes impeachment and conviction *mandatory* in cases of "high crimes and misdemeanors" but *optional* in other cases, see Note, "The Scope of the Power to Impeach," 84 Yale L.J. 1316 (1975).

9. See R. Berger, Impeachment 70–71 (1973).

10. The act was ultimately declared unconstitutional. See Myers v. United States, 272 U.S. 52 (1926), discussed in § 4–10, supra.

11. 1 Trial of Andrew Johnson 157 (1868).

12. See note 10, supra.

13. There appears, however, to be a growing revisionist view that the "real" reason for Johnson's impeachment—his systematic subversion of congressional reconstruction efforts—was a proper basis for conviction and removal from office. See

Richard Nixon was the second President to become the subject of serious impeachment proceedings. Mr. Nixon resigned from office as the thirty-seventh President on August 9, 1974, after his compliance with the Supreme Court's decision in *United States v. Nixon* [14] disclosed information which, when added to evidence already accumulated by the House Judiciary Committee, made virtually inevitable the President's impeachment, conviction, and removal from office. The invocation of the impeachment process in the Nixon case has led to a widespread re-evaluation of the thesis, embraced by many after the Johnson acquittal, that impeachment is of little practical significance as a check on the Chief Executive.[15]

Even before the final revelations, the House Judiciary Committee had found that three proposed articles of impeachment were supported by "clear and convincing" evidence. The Committee had accordingly voted to recommend impeachment by the House and trial by the Senate. These three proposed impeachment articles, voted by the Committee on July 27, 29 and 30, 1974, provide specific illustrations of the contemporary understanding of what constitutes "high crimes and misdemeanors." The Judiciary Committee first found that President Nixon warranted "impeachment and trial, and removal from office" because he had "prevented, obstructed, and impeded the administration of justice" by engaging "personally and through his subordinates and agents in a course of conduct or plan to delay, impede, and obstruct the investigation of [the Watergate break-in]; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities." [16] Under a second Article of Impeachment, the Judiciary Committee determined that President Nixon, "in violation of his constitutional oath . . . and in disregard of his constitutional duty to take care that the laws be faithfully executed," "endeavored to obtain from the Internal Revenue Service in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law. . . .;" "misused" the FBI, Secret Service, and "other executive personnel in violation or disregard of the constitutional rights of citizens. . . .;" "authorized . . . a secret investigative unit . . . within the office of the President, financed in part with money derived from campaign contributions, which . . . engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused . . . to a fair trial;" "failed. . . . to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial and legislative

M. Benedict, The Impeachment and Trial of Andrew Johnson (1973).

14. 418 U.S. 683 (1974) discussed in § 4–15, supra.

15. See, e.g., Firmage and Mangrum, supra note 6, at 1025–26. But the critical thesis has not been abandoned, and proposals of a more parliamentary or quasi-parliamentary substitute for impeachment continue to be advanced. See, e.g., H. Joint Res. No. 903, 93d Cong., 2d Sess. 1111 (1974); Linde, "Replacing a President: Rx for 21st Century Watergate," 43 Geo.Wash. L.Rev. 384 (1975); Havighurst, "Doing Away With Presidential Impeachment: The Advantages of Parliamentary Government," 1974 Ariz.L.Rev. 223.

16. Article I specified nine "means used to implement this course of conduct or plan".

entities . . .;" "knowingly misused the executive power by interfering with agencies of the executive branch . . . in violation of his duty to take care that the laws be faithfully executed."

In a third Article of Impeachment, the Judiciary Committee found that President Nixon "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the [Judiciary] Committee . . . and wilfully disobeyed such subpoenas," contrary to "his oath faithfully to execute the office of the President." The Committee stated that the subpoenaed information was needed "to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President [who] thereby assum[ed] to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives." [17]

A number of independently plausible conclusions about the character of impeachable offences are reinforced by the proposed Nixon impeachment articles. The first of these is the limited usefulness of "criminality" as a measure of "high crimes and misdemeanors". Only the first of the three Nixon impeachment articles voted by the House Judiciary Committee (and limited portions of the second) dealt with alleged presidential violations of federal criminal law.[18] At the same time, the Committee rejected an additional proposed article of impeachment based on evidence of possible criminal irregularities in presidential tax returns and in expenditures of public funds to enhance the value of President Nixon's personal property.[19]

The House Judiciary Committee's proposal of the Nixon Impeachment Articles therefore appears to confirm the view of most commentators: [20] *A showing of criminality is neither necessary nor sufficient for*

17. Article III was adopted by a smaller majority (21–17) than Article I (27–11) or Article II (28–10), in part because of doubts as to the propriety of congressional, rather than judicial, resolution of the Committee's right to subpoena the information from the President. See Final Report on the Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 1035, 93d Cong., 2d Sess., in 120 Cong.Rec. H9103 (daily ed. Aug. 22, 1974). Those doubts were perhaps understandable in light of some of the Supreme Court's needlessly extravagant if stirring language, claiming for itself the role of "ultimate interpreter of the Constitution," in United States v. Nixon, 418 U.S. 683, 704 (1974). It has never been the law, however, that only the Supreme Court can authoritatively resolve constitutional disputes. The whole thrust of the political question doctrine is in fact to the contrary. For an argument that the Judiciary would nonetheless have provided a better forum for deciding whether the President was obliged to submit the requested information to the House, see Pollak, "The Constitution as an Experiment," 123 U.Penn.L.Rev. 1318, 1323–28 (1975).

18. See 18 U.S.C. § 1510 (1970) (making it a felony "willfully [to endeavor] . . . to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator").

19. Also rejected was an article based on the administration's secret-bombing of Cambodia in 1969 and 1970. A useful discussion of the issue posed by that article and its rejection appears in Pollak, supra note 17, at 1329–39.

20. Among the most thoughtful studies, one that reaches this conclusion is particularly worth consulting: Committee on Federal Legislation, Association of the Bar of the City of New York, The Law of Presidential Impeachment (released Jan. 21, 1974).

*the specification of an impeachable offense.*[21] That non-criminal activities may constitute impeachable offenses is hardly surprising. A deliberate presidential decision to emasculate our national defenses, or to conduct a private war in circumvention of the Constitution, would probably violate no criminal code, but it should surely be deemed a ground of impeachment. And there is little doubt that, despite the want of criminality, such an action would fall within the compass of the common law's "great offenses." [22] In contrast, a President's technical violation of a law making jay-walking a crime obviously would not be an adequate basis for presidential removal.[23] With respect to the question of criminality, then, Edmund Burke's opening statement at the impeachment trial of Warren Hastings remains definitive: "It is by this tribunal that statesmen who abuse their power . . . are tried . . . not upon the niceties of a narrow [criminal] jurisprudence, but upon the enlarged and solid principles of morality." [24] Nor could the desire to insure that impeachment not be turned into a partisan political weapon be satisfied by a mechanical rule tying impeachable offenses to enumerated crimes, and it does not in fact require such a rule. A commitment to principle can better be secured, insofar as any verbal formula can help secure it, by accepting and acting on the proposition that "Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar circumstances." [25]

A second conclusion to which the Nixon affair points is that an inductive approach to defining impeachable offenses makes substantial sense. The House Judiciary Committee notably refrained from stating any precise definition of "high crimes and misdemeanors" against which particular proposed impeachment articles could be measured. This approach minimized the possibility of serious partisan division prior to consideration of the actual evidence. In many cases, it may not

21. See R. Berger, Impeachment 56–57 (1973); C. Black, Impeachment: A Handbook 33–35 (1974); C. Hughes, The Supreme Court of the United States 19 (1928); Goldberg, "Question of Impeachment", 1 Hastings Const.L.Q. 5 (1974); S. Boutwell, The Constitution of the United States at the End of the First Century (1895); Fenton, "The Scope of the Impeachment Power," 65 Nw.U.L.Rev. 719 (1970). But see Thompson & Pollit, "Impeachment of Federal Judges: An Historical Overview," 49 N.C.L.Rev. 87, 106 (1970); C. Warren, The Supreme Court in United States History 293 (1922); I, Brait, Impeachment: Trial and Errors (1972).

22. See generally Staff Report, House Judiciary Committee, "Constitutional Grounds for Presidential Impeachment" (released Feb. 22, 1974).

23. Some crimes that do not relate directly to the President's official duties may nevertheless be impeachable offenses if their character is such as to taint the office of the presidency. For example, a President's murder of a personal enemy, while not bearing directly upon official presidential duties, would so malign the holder of the office that the President, stripped of legitimacy, would be unable effectively to discharge presidential duties. See C. Black, Impeachment: A Handbook 39 (1974). "At the heart of the matter is the determination [that] the officeholder has demonstrated by his actions that he is unfit to continue in the office in question." Committee on Federal Legislation, supra note 20.

24. 7 E. Burke, Works 11, 14 (1839).

25. Committee on Federal Legislation, supra note 20.

be until such evidence is known that legislators will perceive the need to abandon their ordinary partisan or personal loyalties. In this special context, the usual equation between ignorance and impartiality plainly makes little sense. Moreover, deciding whether impeachable conduct has occurred primarily on the basis of the conduct's factual context, rather than in terms of the application of some general rule, is more in keeping with the necessarily political—but *not* necessarily partisan—character of the impeachment process.

We turn finally to a brief consideration of the *process* of impeachment and trial. Article I, § 2, cl. 5, declares that "[t]he House of Representatives . . . shall have the sole Power of Impeachment." [26] But what *is* impeachment? In many senses, it is analogous to a grand jury indictment in the criminal justice system.[27] The House of Representatives decides by majority vote whether charges raised against "civil officers" are sufficiently serious, and are supported by sufficient evidence, to warrant holding a Senate trial.

With respect to federal grand jury proceedings, the Supreme Court has refused to establish a rule permitting defendants to challenge indictments as supported by inadequate or incompetent evidence: in the subsequent "trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict." [28] However this may be in the grand jury setting, in the context of impeachment the institutional costs of a Senate trial, as well as the extraordinary damage done to a civil officer's reputation by the "mere" fact of impeachment, have caused the House of Representatives to impose restraints on its impeachment decisions that the Supreme Court has not imposed on federal grand juries. For example, in 1974 the House Judiciary Committee, charged by the full House with responsibility for making a preliminary (and probably definitive) decision as to whether articles of impeachment should be voted against President Nixon, imposed upon itself the requirement that any impeachment article must be supported by "clear and convincing evidence" before it could be favorably reported out of committee. It seems likely that the House of Representatives itself would have applied the same standard in voting on the articles of impeachment if President Nixon had not resigned before such a vote could be taken.

Article I, § 3, cl. 6, governs the conduct of a trial of impeachment: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: and no person shall be convicted without the concurrence of

26. For an analysis of impeachment procedure in the House, see Firmage and Mangrum, supra note 6, at 1032–50. The place (if any) of executive privilege in House impeachment investigations is discussed in § 4–16, supra.

27. See C. Black, Impeachment: A Handbook (1974).

28. Costello v. United States, 350 U.S. 359 (1956) (holding that a defendant in a federal criminal case may be required to stand trial, and that his conviction may be sustained, where only hearsay evidence was presented to the grand jury which indicted him).

two thirds of the members present." [29] Although the Chief Justice presides when the President is on trial, the Senate, possessor of "the sole Power to try all Impeachments," decides the procedural and evidentiary rules which govern such trials. Under the prevailing rules, the Senate can overrule decisions of the Chief Justice concerning the admissibility of evidence, and, by passing questions to the Chief Justice, individual Senators may interrogate witnesses.[30]

Article I, § 3, cl. 7, limits the effect of impeachment and conviction by providing that "Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law". Such criminal liability is absolute; Congress cannot eliminate it by a grant of immunity, nor the President by an exercise of the pardon power.[31]

It is widely thought that article I, § 9, cl. 3,[32] evidences the intention of the Framers that the English practice of directing criminal punishments against specific offenders as part of the legislative process should not be adopted in the United States. At the same time, those who drafted article I, § 3, cl. 7, did not wish to immunize office-holders from criminal prosecution; the clause was designed in part to make clear that criminal prosecutions subsequent to removal from office would not constitute double jeopardy of the sort explicitly prohibited by the fifth amendment.[33]

29. For an analysis of impeachment procedure in the Senate, see Firmage and Mangrum, supra note 6, at 1050–62, 1073–78. The place (if any) of executive privilege in Senate impeachment trials is discussed in § 4–16, supra.

30. See "Impeachment and the U.S. Congress." Cong.Q. 12–13 (March, 1974).

31. U.S. Const., art. II, § 2, cl. 1, gives the President the "power to grant . . . pardons . . . except in cases of impeachment." See § 4–11, supra.

32. "No Bill of Attainder . . . shall be passed." See §§ 10–4, 10–5, infra.

33. This interpretation gives the impeachment judgment clause significance as something other than a specification of time sequence. Indictment of "civil officers" prior to impeachment and removal is not necessarily prohibited. See Firmage & Mangrum, supra note 6, at 1094–1102; Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1133, 1136 (1974). See § 4–14, supra. This construction of the impeachment judgment clause also reinforces the proposition that, since impeachment is an ultimately political process, impeachable offenses must be defined politically, and are not limited to indictable crimes.

# Impeach or Indict?

**IF YOU THINK KENNETH STARR IS GOING TO INDICT BILL CLINTON, YOU'LL BE SORELY DISAPPOINTED. STARR CAN INVESTIGATE, BUT IT WILL BE UP TO CONGRESS TO ACT.**

**BY BYRON YORK**

All across Capitol Hill, a sense of frustration and resignation has set in among those who have spent the past three years investigating Clinton administration scandals. What do they have to show for their work? The Travelgate investigation uncovered wrongdoing and stonewalling throughout the White House, but the administration seems to have suffered no lasting political damage. The Whitewater hearings destroyed the credibility of several top White House aides, but most remain in their jobs, and several have been generously reimbursed—with taxpayer dollars—for their legal expenses. Filegate, so promising last summer, bogged down by fall, when Republicans were unable to discover which higher-ups were behind the administration's widespread abuse of the FBI.

In short, political oversight didn't work. Bill Clinton and his staff proved sharper, slicker, and more determined to obstruct Congress than even some of their opponents had imagined. Now the energy that once drove the congressional investigations has been replaced by a quiet—and perhaps desperate—faith in Kenneth Starr, the independent counsel who is investigating Whitewater, Travelgate, and Filegate.

Clinton's adversaries hope Starr will indict the president. But they are likely to be disappointed, because a look at the law and history shows that it is a virtual certainty that Starr will *not* indict Bill Clinton—at least not while he is in the White House. And if the independent counsel does find presidential crimes, the issue will go not to the courts but back to Capitol Hill, where members of Congress from both parties will be forced to abandon the easy soundbites of oversight hearings and instead face a difficult vote on the question of impeachment.

## THE UNINDICTABLE MAN

Can Clinton be indicted while he is president? For those who believe that no man is above the law, the answer would seem an easy yes. But it is not as simple as that.

The Constitution does not specifically address the question. Article II, Section 4 says only that "The President...shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Article I, Section 3 says that "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law." Taken together, the clauses mean the president can be both impeached and prosecuted. But which comes first? There is good reason to argue that prosecution is possible only after impeachment.

The issue was at the heart of Watergate when Richard Nixon contended that he could not be indicted as long as he was president. At the same time, Spiro Agnew, facing problems of his own, claimed that *he* couldn't be indicted as long as he was vice president. Agnew argued that the Constitution required that he be impeached before he could be indicted, gambling on the possibility that Congress wouldn't go forward with impeachment and he could thus escape punishment. Nixon hoped for much the same thing.

Agnew's strategy was a failure. Solicitor General Robert Bork, representing the Justice Department, argued that the vice president, like other public officials, could indeed be indicted while in office. Bork's reasoning was that the vice president's job just wasn't important enough for him to be immune from prosecution. But Bork also addressed the Nixon question by declaring that the president *was* so important that he could not be indicted while in office. He based his argument on three points:

- The Constitution gives the president exclusive control of the executive branch; it is the only branch of government headed by a single person. Therefore, Bork wrote, "if the president were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government..."

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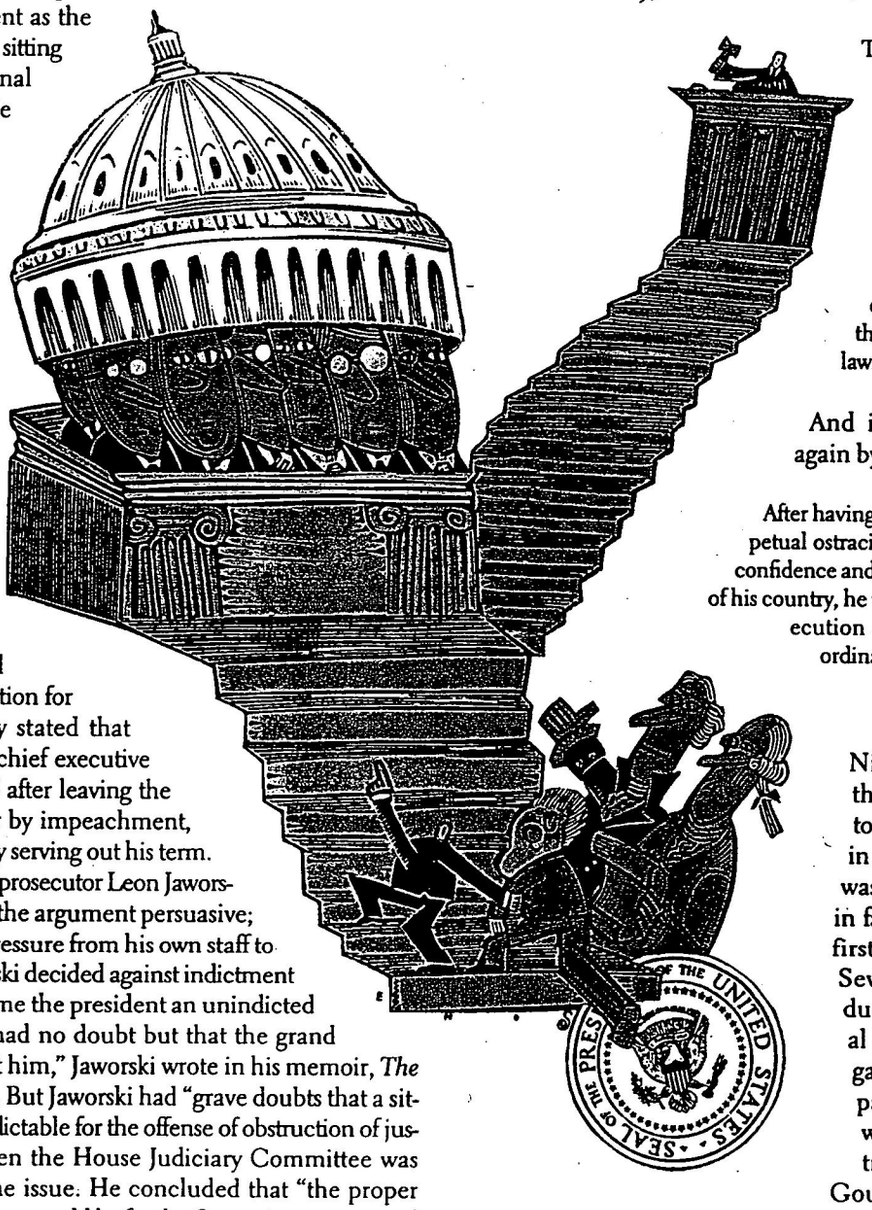
• The Constitution gives the president the power to enforce the law, to grant pardons, and to appoint judges. Bork argued that it would create a massive conflict for the president to face his own law enforcement institutions. "Since the president's powers include control over all federal prosecutions," Bork explained, "it is hardly reasonable or sensible to consider the president subject to such prosecution."

• The Constitution prescribes impeachment as the only way to punish a sitting president for criminal misconduct. "He is amenable to the criminal laws," Bork wrote, "but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions."




Bork's argument had the convenient effect of protecting Nixon while cutting Agnew loose. But his brief offered little ultimate protection for Nixon; Bork clearly stated that Nixon or any other chief executive could be prosecuted after leaving the presidency, whether by impeachment, resignation, or simply serving out his term.

Watergate special prosecutor Leon Jaworski apparently found the argument persuasive; despite enormous pressure from his own staff to charge Nixon, Jaworski decided against indictment (although he did name the president an unindicted co-conspirator). "I had no doubt but that the grand jury wanted to indict him," Jaworski wrote in his memoir, *The Right and the Power*. But Jaworski had "grave doubts that a sitting president was indictable for the offense of obstruction of justice," especially when the House Judiciary Committee was considering the same issue. He concluded that "the proper constitutional process...would be for the Committee to proceed first with its impeachment inquiry."

But Jaworski did not stop there. After reaching his decision not to indict, he went one crucial step further: he sent the evidence he had gathered—organized into what his staff called the "road map"—to the House committee. At that point, the matter was in the domain of the political system.

There are indications the framers of the Constitution would have agreed with Jaworski's decision not to indict. Even though they chose not to specifically enumerate it in the Constitution, the founders apparently believed that a president would have to face political judgment before facing criminal justice. In *Federalist No. 69*, Alexander Hamilton wrote:

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law.

And in *Federalist No. 65*, again by Hamilton:

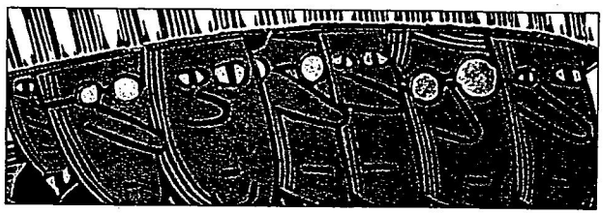
> After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of the law.

Clearly Richard Nixon was very lucky that Alexander Hamilton did not succeed him in office. But Hamilton was not the only framer in favor of impeachment first, prosecution later. Several months earlier, during the constitutional convention, the delegates argued over which part of government would be best suited to try impeachments. Gouverneur Morris of Pennsylvania urged that the Senate, rather than the Supreme Court, should sit in judgment of the president, because the high court would likely "try the President after the trial of the impeachment." His argument carried the day.

## STARR'S BIG MOVE

What does this mean for Kenneth Starr? First of all, it means he won't indict Bill Clinton while Clinton is president. In several public statements, Starr has made clear that he has great respect for precedent and the accepted practices of the judicial system. It is very unlikely that he would jump outside of both to indict Clinton. And if he did, it is a sure thing that Clinton would mount a ferocious defense along Nixon/Bork lines. Just look at how energetically—and so far successfully—he has argued that he should not be the target of the Paula Jones *civil* suit as long as he remains in office.

But if Starr has strong evidence that Clinton has committed crimes, what does he do with it? We know from the McDougal trial, for example, that $50,000 that was obtained by defrauding the United States government was channeled into Clinton's company; the money was part of the illegal $300,000 Small Business Administration loan that went to Susan McDougal. The president testified under oath and on videotape that he knew nothing about the fraudulent loan. If Starr were to discover clear and convincing evidence that the president committed perjury, he would face the question of how to advance the case against a sitting president without resorting to a possibly unconstitutional indictment.



**If Kenneth Starr tries to indict the president, it's a sure thing that Bill Clinton would mount a ferocious defense along Nixon/Bork lines from 1974.**

Jaworski's "road map" provides the answer. By refusing to indict the president and instead giving his evidence to the House Judiciary Committee, Jaworski limited his role as prosecutor to that of evidence-gatherer. Starr would do the same thing: by handing the issue to Congress, where it could be properly dealt with by elected representatives. And there's one more reason Starr will go to Congress: unlike Jaworski in 1974, Starr is required by law to do so. Section 595 (c) of the independent counsel law instructs the independent counsel to "advise the House of Representatives of any substantial and credible information which such independent counsel receives...that may constitute grounds for an impeachment."

## IMPEACH: YES OR NO?

Once it has possession of Starr's evidence, how would members of Congress decide whether or not to impeach? They would likely return to what the founders had to say about the issue. The framers of the Constitution believed that the citizenry should have the right to remove the chief executive not only in the normal course of elections but also in cases of wrongdoing. And they clearly foresaw that the question would arise from time to time. Consider the following excerpt from the *Records of the Federal Convention of 1787*, in which several delegates attempted to convince two holdouts that an impeachment clause should be included in the new Constitution:

> **Mr. Pinckney** [Charles Pinckney of South Carolina] & **Mr. Morris** [Gouverneur Morris of Pennsylvania] moved to strike out this part of the Resolution. **Mr. P.** observed [the president ought not] be impeacheable whilst in office.
> **Mr. Davie** [William Richardson Davie of North Carolina] said if he not be impeacheable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this as an essential security for the good behaviour of the Executive.
> **Mr. Morris** [said]...In case he should be re-elected, that will be sufficient proof of his innocence. Besides, who is to impeach? Is the impeachment to suspend his functions? If it is not, the mischief will go on. If it is, the impeachment will be nearly equivalent to displacement, and will render the Executive dependent on those who are to impeach.
> **Col. Mason** [George Mason of Virginia] said no point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all, shall that man be above it, who can commit the most extensive injustice?...
> **Docr. Franklin** [Benjamin Franklin] said...it would be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.
> **Mr. Madison** [James Madison of Virginia] thought it indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security....
> **Mr. Gerry** [Elbridge Gerry of Massachusetts] urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them....

The discussion changed Morris's mind, and he later voted in favor of an impeachment clause. (The measure carried, ten to two.) But more serious disagreements arose concerning the seriousness of wrongdoing that would be necessary to trig-

ger an impeachment proceeding. Some of the framers believed Congress should be empowered to get rid of the president for almost any reason. For example, according to the *Records*, Roger Sherman of Connecticut contended "that the National Legislature should have power to remove the Executive at pleasure." It was a fairly popular position; an early draft of the Constitution stipulated that the president could be removed for "malpractices or neglect of duty," which would have given Congress enormous leeway in choosing to get rid of a president.

A later draft added the word "corruption" to the list of impeachable offenses. But by late August 1787, those in favor of limiting impeachments had changed the draft to specify that the president could be removed for just two reasons: treason and bribery. That set off an impassioned debate. "Why is the provision restrained to treason and bribery only?" George Mason asked the convention. "Treason as defined in the Constitution will not reach many great and dangerous offences..." Mason moved that "maladministration" be added to the list of impeachable offenses. That provoked a protest from Madison, who argued that "maladministration" was so vague that it would mean that the president served "a tenure during pleasure of the Senate." Mason eventually surrendered, abandoning "maladministration" and proposing "high crimes and misdemeanors" instead. The phrase was approved by a vote of eight to three and became the final wording of the Constitution.

**This is not an abstract scenario; it could happen, and rather quickly. But so far, almost no one in Congress will even admit to thinking about it.**

In the more than 200 years since the document was ratified, no one has come up with a specific definition of "high crimes and misdemeanors." But clear and convincing evidence from Starr that the president is guilty of perjury, obstruction of justice, or a variety of other offenses would certainly fit the bill. In fact, it might result in articles of impeachment similar to those drawn up by the House Judiciary Committee against Richard Nixon in 1974. Some of the committee's charges against Nixon included:

- [M]aking false or misleading statements to lawfully authorized investigative employees of the United States.
- [W]ithholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States.
- [M]aking or causing to be made false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States...and that there was no involvement of such personnel in such misconduct.
- [Failing] without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives...

All but the most zealous defenders of Bill Clinton would be hard-pressed to deny that the list is strikingly similar to present-day accusations against the president.

## THE FIGHT AHEAD

If Starr forwards evidence of possible Clinton crimes to Congress, the beginning of an impeachment inquiry would put enormous demands on the leadership of the House of Representatives. No longer would the president's critics be able simply to accuse the White House of corruption. In an impeachment they would have to go on record with a vote that might ultimately come back to haunt them should the impeachment attempt fail. And should it succeed, of course, the burden would then shift to the Senate for trial.

This is not an abstract scenario; it could happen, and could happen rather quickly. But so far, almost no one in Congress will even admit to thinking about the issue. "We deal with facts rather than speculation," says one Judiciary Committee staffer, adding that there have been no discussions on the issue. "I haven't heard of anything yet," says another committee official. "The sad thing around here is that no one really has prepared," says a Republican who is not on Judiciary. "No one here has talked about it."

They should, and soon, because Starr's years of investigation might result in action against the president at any time. When the independent counsel follows the intentions of the framers—plus his own statutory mandate—and passes the evidence on to Congress, it will be time for lawmakers to put up or shut up. Starr can point the way, but the 105th Congress will have to decide.